POSITION OF DISCLOSED PRINCIPAL UNDER WRITTEN CONTRACT MADE BY HIS AGENT. — The determination of a disclosed principal's position under simple written contracts purporting to be made by the agent personally, has given rise to conflicting views.[1] Of course, even though the contract appears to be the agent's, if from its face there may be gathered an intention that the agent shall not be bound, he is not liable. Such, in a recent English case, was found to be the fact. *Morley* v. *Makin*, 22 T. L. R. 7 (K. B. Div.). But where, *prima facie*, the agent appears to be personally contracting, the accepted English law is that the third person has his option to sue either the agent or the disclosed principal, and the latter may enforce the contract as his own.[2] In this country there is no holding on the agent's liability, and what little square authority is to be found on the principal's position is conflicting. This permits an examination of the question on principle.[3] A careless assimilation is often made of the case of disclosed principal to the doctrine of undisclosed principal.[4] The latter, of course, cannot be explained on any theory of contract. It is a distinct principle of the law of agency, founded on the practical identification from a business view of principal with agent. But when the principal's name is disclosed, a different situation arises. Only one contract is in fact made. Here the law of agency makes no peculiar demands, and the law of contracts should control in creating but a single liability.

This is so where the agreement is oral; but in case of written contracts the "parol evidence rule" asserts itself. This is really not a rule of evidence at all, but embodies rules of substantive law.[5] As applied to contracts, it means that a writing expressing the terms of the contract is deemed the conclusive expression of intention of the parties. If, then, this rule have any vitality, the English doctrine is a clear infringement. The disclosed principal's liability has been defended on two grounds overlapping each other somewhat. It is suggested, on the one hand, that the principal may use any signature he pleases, and therefore the signature of the agent is really the principal's. This is a bald *non sequitur*. Of course the principal may use the agent's name as his business name, and when he does so he is liable.[6] Further, if the agent's name is the disclosed principal's, the English doctrine giving an optional right against agent or principal is indefensible. The second argument is, that to show that the principal was in fact meant and not the agent is not varying the instrument, but only explaining it.[7] This is ingenious, but contrary to fact. If X does business in his own name, and a contract is made by A, his agent, A cannot truthfully be identified as other than A. (If an omitted party may be introduced, why not an omitted term of the contract?) As far, then, as an action on the contract is concerned, the presumption of election to hold the agent should be conclusive. If, however, the parties intended that the principal be liable and have simply

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[1] The authorities are collected in Wambaugh, Cases on Agency 548–582; see also Barbre *v.* Goodale, 28 Ore. 465; Ferguson *v.* McBean, 91 Cal. 63.

[2] Higgins *v.* Senior, 8 M. & W. 834; Calder *v.* Dobell, L. R. 6 C. P. 486; see also 2 Smith's Lead. Cas., 11th Eng. ed., 413 ff.

[3] The rule as stated by American text-writers accords with the English doctrine. Story, Agency § 160, a; Clark & Skyles, Agency 758.

[4] See Byington *v.* Simpson, 134 Mass. 169.

[5] Thayer, Prel. Treat. Ev. 397 *et seq.*

[6] Trueman *v.* Loder, 11 Ad. & E. 589. This is also the case in the suggested analogy of a dormant partner represented by the ostensible partner's name.

[7] This line of reasoning is equally applicable to sealed instruments, yet no one thinks of applying it.

failed to express their intention perfectly, an erroneous legal liability has been created through mutual mistake. The case therefore is a proper subject for reformation and rescission.[8] Here the use to which parol evidence is put is legitimate — equitable relief based on mutual mistake. The situation is analogous to the cases where a sealed instrument is signed by one partner under mistaken belief that all are thereby bound. Equity will give effect to this intention by reforming the instrument.[9] In a bill for equitable relief, however, stronger proof of the alleged intent of the parties is required than in an action on the contract.[10]

VALIDITY OF TRUST PERFORMABLE OUTSIDE OF JURISDICTION OF ITS CREATION. — Where a testamentary trust is created in one state to be administered in a foreign state, an interesting question at once arises as to which law is to determine the validity of the trust. In the case of realty it would seem that the *lex rei sitae* must govern as in all other cases involving the creation of an interest in land.[1] In a trust of personalty, the validity of the bequest should be determined by the law of the testator's domicile. Thus, where a gift of personalty to a foreign corporation to be invested in land is valid by the *lex domicilii* of the testator, it is not affected by the statute of mortmain of the state of administration.[2] The executor may receive the bequest in the former state; the latter state does not forbid the investment of the money in land. So a testamentary trust, good by the law of the state of its creation, is not invalidated by the fact that in the state where administration is to occur such a trust would be bad for indefiniteness of object.[3] And the result is similar where the trust contravenes the rule against perpetuities of the latter state.[4] Where, however, the trust is too remote by the *lex domicilii* of the testator, it is said that it is not against the policy of that law to allow the creation of a perpetuity abroad, and that therefore the trust is valid if not opposed to the law of the state of administration; and the same may be said as to a trust contrary to the mortmain statutes of the testator's domicile.[5] This result seems based on the assumption that the *lex domicilii* of the testator allows the validity of such a trust to be determined by the foreign law. Where, therefore, the limitation is too remote by both laws, it must certainly be void.

Where an equitable conversion occurs, the question is more intricate. A devise of land on trusts which are invalid by the *lex rei sitae* but accompanied by a direction to sell and invest the proceeds on trusts which are

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[8] See Wake *v.* Harrop, 6 H. & N. 768.

[9] See McNaughten *v.* Partridge, 11 Oh. St. 223; 2 Ames, Cas. Eq. Jur. 220, n. 2. When the Statute of Frauds requires a writing, reformation in conformity with the oral bargain could probably not be obtained under the prevailing English doctrine. See 2 Ames, Cas. Eq. Jur. 299, n. 2.

[10] See Hough *v.* Smith, 132 Ala. 204; 2 Ames, Cas. Eq. Jur. 312, n. 2.

[1] Acker *v.* Priest, 92 Ia. 610.

[2] Canterbury *v.* Wyburn, [1895] A. C. 89.

[3] Handley *v.* Palmer, 91 Fed. Rep. 948; Fellows *v.* Miner, 119 Mass. 541; and see Jones *v.* Habersham, 107 U. S. 174.

[4] Cross *v.* U. S. Trust Co., 131 N. Y. 330; Dammert *v.* Osborn, 140 N. Y. 30.

[5] Hope *v.* Brewer, 136 N. Y. 126; Vansant *v.* Roberts, 3 Md. 119; and see Gray, Rule against Perpetuities, 2d ed., 266.